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No. 06-36

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In The

Supreme Court of the United States

PUBLIC AGENCY COMPENSATION TRUST (PACT),

Petitioner,

v.

COLIN PERRY ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The Nevada Supreme Court

REPLY IN BRIEF

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MOVANT'S BRIEF IN REPLY

PACT respectfully submits the instant Brief in Reply to the Briefs in Opposition submitted by Colin Perry and EICN.

A. PACT HAS STANDING TO ASSERT A FOURTEENTH AMENDMENT DUE PROCESS VIOLATION.

Points not raised in the lower court will not be entertained for the first time on appeal. *Gibbons v. Martin*, 91 Nev. 269, 270, 534 P.2d 915, 915 (1975) (citation omitted). Respondents never challenged PACT's standing in the lower proceedings; therefore, the issue is improperly raised for the first time in their Opposition Briefs. Nevertheless, PACT has standing to bring this Petition.[1]

PACT is an association of self-insured public employers as defined by NRS 616A.055.[2] Further, NRS 277.055(2)(a) allows two or more public agencies to enter into cooperative agreements to purchase casualty insurance as defined by NRS 681A.020.[3] PACT was created under the Interlocal Cooperation Act of Nevada,[4] and pursuant to the Public Agency Compensation Trust Interlocal Cooperation Agreement

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[1] *See Assoc. of Data Processing v. Camp.*, 397 U.S. 150, 153, 90 S. Ct. 827, 830, 25 L. Ed. 2d 184 (1970) (standing concerns whether the interest sought to be protected is within the "zone of interests" to be protected by the constitutional guarantee in question and may include economic values (citation omitted).

[2] An association of self-insured public employers is a nonprofit, unincorporated association with five or more public employers issued a certificate to operate by the Commissioner of Insurance. *See also* NRS 616A.270 defining an "Insurer" as self-insured employers; associations of self-insured public and private employers; and private carriers.

[3] Casualty insurance includes workmen's compensation and employer's liability. NRS 681A.020(c).

[4] NRS 277.080 *et seq.*

("Agreement"). App. F 1f-3f.[5] The Agreement gives PACT the power to sue and be sued in its own name. App. F 4f-5f.

Public and private self-insured employer associations are subject to NRS 616B.350 through NRS 616B.446, which establish qualifications and procedures regarding associations' operations and fiscal responsibilities. Associations must elect a board of trustees consisting of at least five members. NRS 616B.365(1). The power of the board includes taking necessary action to protect the assets of the association. NRS 616B.365(2)(b). Arguably, this includes filing suit; a power expressly granted to PACT in the Interlocal Cooperation Agreement under which PACT was created.

Great American Ins. Co. v. U.S., 575 F.2d 1031 (2d Cir. 1978), cited by Perry is inapplicable. That was a subrogation action instituted by a private insurer after the U.S. Government refused to reimburse it for damage to the insured's premises. Perry Opp. at 5.[6] PACT is not asserting a subrogation right here, therefore PACT is not "standing in the shoes" of its members seeking reimbursement on their behalf. Rather, PACT seeks to safeguard the assets of the association by challenging an over-inclusive statute that forces it to pay claims not causally related to an employee's employment. Perry acknowledges that *PACT*, *not* the Sheriff's Department brings the instant Petition positing the distinction is insignificant. *Id.* The distinction is significant because the Nevada Legislature has specifically afforded both public and private self-insured employer associations the right to take appropriate measures

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[5] Due to Respondents' new argument that PACT lacks standing, it was necessary for PACT, in its Reply Brief, to supplement the Appendix with additional material to aid the Court's understanding of PACT's formation and the rights afforded to it by law. *See* Supreme Court Rule 14(i)(vi).

[6] In addition, the action was dismissed as being time barred, not because the court found the insurer did not possess standing to sue the U.S. Government. *See Great American*, 575 F.2d at 1033.

to protect the assets of the association, including filing suit in its own name.[7]

EICN's argument that political subdivisions are "banding together" to flout the state's Fourteenth Amendment immunity is also flawed. EICN Opp. at 5. If association members are "banding together" it is because the law *requires* at least five employers engaged in the same or similar classification of employment to be considered for inclusion in a self-insured association. NRS 616B.350(1)(a). PACT also rejects the notion that a public self-insured association has "better" rights than a public entity standing alone.[8] EICN Opp. at 5. PACT contends that all insurers would have the right to bring this Petition pursuant to their codified appellate rights.[9] Thus, EICN's argument that PACT should be treated as a public entity rather than a private insurance company *id.*, is irrelevant and should be

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[7] *See generally* NRS 81.170 *et seq.*, which governs cooperative associations and provides entities organized under that section may sue and be sued in any court in its associate name, and may do all other things proper to be done for the purpose of carrying into effect the objects for which the cooperative association is formed. NRS 81.220(1), NRS 81.220(10).

[8] *See* NRS 616B.300 to NRS 616B.366, inclusive, which apply to self-insured employers.

[9] *See* NRS 233B.130 (party aggrieved by the decision in an administrative proceeding may petition for judicial review); NRS 233B.150 (aggrieved party may appeal final judgment of the district court to the supreme court); NRS 313C.315 (an aggrieved person may request a hearing before a hearing officer); NRS 616C.345 (party aggrieved by a hearing officer's decision may appeal to the appeals officer); NRS 616C.370 (judicial proceedings are limited to judicial review of the decision of an appeals officer), *but see* Pet. at 13a, ¶¶ 16-18 (appeals officer decision concluding that it is not a court for review of constitutional challenges, citing *Nev. Indus. Comm'n v. Reese*, 93 Nev. 115, 560 P.2d 1352 (1977)); *and see U.S. v. ICC*, 337 U.S. 426, 69 S. Ct. 1410, 93 L. Ed. 1451 (1949) (United States appealed a decision of the Interstate Commerce Commission to district court, and was required to be added as an opposing party by statute; thus where the United States was bringing suit against itself, this court said a court must look behind names that symbolize the parties to determine whether a justiciable case or controversy is present).

rejected.[10] *See* also footnote 9. PACT has standing to assert a Due Process claim under the Fourteenth Amendment.

B. THE RATIONAL RELATIONSHIP TEST APPLIES TO PRESUMPTIONS THAT ARE REBUTTABLE.

A rebuttable presumption operates to shift the burden of proof, while a conclusive presumption "is in actuality a substantive rule of law." *City and County of San Francisco v. Workers' Compensation Appeals Bd.*, 583 P.2d 151, 162 (Cal. 1978); *Howard v. City of Las Vegas*, 121 Nev. Adv. Op. 70, 120 P.3d 410, 411 (Nev. 2005) (firefighters with heart diseases are entitled to occupational disease benefits *as a matter of law*) (emphasis added). *See also, e.g.*, 4 Wigmore Evidence § 1353 (Chadbourn rev. 1972) (a rule of conclusive evidence is not a rule of evidence at all, but rather a rule of substantive law).

In *Mobile, J. & K.C.R. Co. v. Turnipseed*, 219 U.S. 35, 43, 31 S. Ct. 136, 55 L. Ed. 78 (1910), this Court held in a due process challenge, there must be a rational relationship between the presumed fact and the fact proven. *See also Usery v. Elkhorn Mining Co.*, 428 U.S. 1, 28, 96 S. Ct. 2882,

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[10] Although the court in *Matter of Passino v. Jefferson-Lewis*, 277 A.D.2d 1028 (2000), found the municipal cooperative health benefit plan to be a public agency rather than analogous to a private insurer, also holding it was a commercial enterprise by legislative design. *Id.* at 1029. As a public agency, the municipal cooperative was afforded protection under the "commercial enterprise" exception from having to disclose public agency records under a Freedom of Information Law request. *Id.*; *and see* NY CLS Pub. O. § 87(2)(d). Moreover, despite the court's underlying rationale for finding the municipal cooperative to be agency, it is noteworthy that the New York legislature in NY CLS Ins. § 4701 made legislative findings evincing that legislature's intent, like Nevada, to conserve the assets of the health plan, including: the employment of appropriate safeguards to help keep self-funded municipal cooperative health benefits plans from exposing municipalities and their taxpayers to unpredictable and potentially catastrophic liabilities; and implementing a system to assure the plans were operated on an actuarially sound basis with appropriate financial standards to protect plan participants, their beneficiaries and taxpayers. NY CLS Ins. § 4701(b), (d)(1).

49 L. Ed. 2d 752 (1976) (presumptions in civil statutes are consistently tested against the standard in *Turnipseed*). *Turnipseed* further stated the test applies to presumptions that are *rebuttable*, and no violation of due process will be found where the opposing party has the *opportunity to present a defense* to the main fact presumed.[11] In later cases where this Court held irrebuttable presumptions unconstitutional, the Court stated that the application of an irrebuttable presumption that is not necessarily or universally true in all cases is violative of the Due Process Clause. *Cleveland v. Bd. of Ed. v. LaFleur*, 414 U.S. 632, 644, 94 S. Ct. 791, 799, 39 L. Ed. 2d 52, 64 (1974). *See also Vlandis v. Kline*, 412 U.S. 441, 462, 93 S. Ct. 2230, 37 L. Ed. 2d 63 (1973) (Rehnquist, J., dissenting) ("the Court now engrafts the 'close judicial scrutiny' test onto the Due Process Clause whenever we deal with something like 'permanent irrebuttable presumptions' (demonstrating his belief that, although not announced, scrutiny greater than rational basis was applied to test the irreubuttable presumption)).

Perry argues the holding of *City and County of San Francisco, supra*, rendered this Court's decisions invalidating unconstitutional conclusive presumptions inapplicable to the instant Petition. Perry Opp. at 4. However, the presumption in that case was not a "conclusive" presumption "similar" to that of Nevada, as Perry suggests. *Id.* at 9.[12] Rather, Cal. Lab. Code § 3212.5 plainly states the California presumption

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[11] The presumption "must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed. If a legislative provision not unreasonable in itself, prescribing a rule of evidence, in either criminal or civil cases, does not shut out from the party affected a reasonable opportunity to submit to the jury in his defense all of the facts bearing upon the issue, there is no ground for holding that due process of law has been denied him." *Turnipseed*, 219 U.S. at 43.

[12] Moreover, although both Respondents positively cite *City and County of San Francisco*, neither Perry nor EICN distinguishes how the public employer, City and County of San Francisco, had standing to directly challenge the statute at issue in that case.

is disputable.[13] Thus, *City and County of San Francisco* is inapplicable to the Petition at bar.

Respondents also cite *Usery, supra*, arguing this Court upheld an irrebuttable presumption applying the rational basis test. *See* Perry Opp. at 5; *and see* EICN Opp. at 7. Distinguishing the four presumptions discussed in *Usery* demonstrates the error in Respondents' argument. Section 411(c)(3) of the Black Lung Act contains the only irrebuttable presumption in the Act – giving an employee the presumption of total disability and qualifying him for benefits. *Usery*, 428 U.S. at 21. The Court did not apply the rational basis test to the irrebuttable presumption, but concluded Congress was essentially guilty of bad drafting, as it could have provided the same benefit to miners without using an irrebuttable presumption. *Id.* at 23-24.

The three other presumptions in the Act were held to be "*explicitly rebuttable* by an operator seeking to *avoid liability*." *Id.* at 11 (emphasis added). The effect of these presumptions was to shift the evidentiary burden going forward from the claimant to the operator. *Id.* at 27. *See also Pauley v. Bethengery Mines, Inc.*, 501 U.S. 680, 702-03, 111 S. Ct. 2524, 2537, 115 L. Ed. 2d 604 (1991) (rejecting argument that the regulations created a conclusive presumption as the statutes expressly provided the presumptions would be rebuttable).

Usery's rebuttable presumptions shifted the burden of production going forward to the employer, and did not bar the employer from submitting rebuttal evidence against liability altogether. The conclusive presumption in NRS 617.457(1), however, bars PACT from submitting any rebuttal evidence against the presumed causation between employment and heart disease. Hence, *Usery* is distinguishable regarding the

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[13] *See* Cal. Lab. Code § 3212.5 ("Such heart trouble or pneumonia so developing or manifesting itself shall be presumed to arise out of and in the course of the employment . . . *This presumption is disputable and may be controverted by other evidence* . . . Such heart trouble shall in no case be attributed to any disease existing prior to such development or manifestation.") (Emphasis added).

Court's application of the rational basis test to the presumption.

The result of NRS 617.457(1) remains analogous to the "individual" unconstitutional irrebuttable presumption cases cited in PACT's opening brief. *See*, Pet. at 6-8; *and see* Perry Opp. at 4.[14] Like *Vlandis v. Kline*, 412 U.S. 441, 93 S. Ct. 2230, 37 L. Ed. 2d 63 (1973), the conclusive presumption in NRS 617.457(1) deprives PACT of the opportunity to overcome the presumption, resulting in a deprivation of financial assets without due process of law. *See Vlandis*, 412 U.S. at 452.

Respondents cite NRS 617.457(6),[15] as a means to challenge eligibility of the conclusive presumption. PACT is not challenging Subsection 6; however, Perry's case demonstrates the utter futility of the provision. The Appeals Officer found Perry suffered from predisposing conditions, including: age, diabetes, hyperlipidemia, high cholesterol, high blood pressure and obesity. Pet. at 7a, ¶ 21. Although Perry did not "correct" the predisposing conditions, the conclusive presumption was applied because the Appeals Officer found Perry cooperated by taking medication and dietary advice prescribed by his doctors. Pet. at 9a ¶ 2. If the lower court's decisions are allowed to stand, an employee still benefits from the conclusive presumption without actually correcting his predisposing conditions. Notwithstanding the Appeals Officer's decision, NRS 617.457(6) only applies to conditions that are correctable by the employee.

City of Temple Terrace v. Bailey, 481 So.2d 49 (Fla. Dist. Ct. App. 1985) illustrates such a paradigm. There,

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[14] Despite Perry's attempt to distinguish cases brought by individuals as inapplicable to PACT, PACT believes it has successfully demonstrated in the foregoing Standing Argument that it has recognition and rights unto itself like an "individual" that are independent of its public employer members.

[15] NRS 617.457(6) provides: Failure to correct predisposing conditions which lead to heart disease when so ordered in writing by the examining physician subsequent to the annual examination excludes the employee from the benefits of this section if the correction is within the ability of the employee.

the court held the rebuttable presumption in Fla. Stat. § 112.18(1) was misapplied when the hearing officer found a fire chief's congenital aortic stenosis a compensable work related injury. *Id.* at 50. Although the chief underwent an employment physical, the disease was not detected until it progressed to causing severe physical symptoms requiring valve replacement. The court opined the medical evidence of a congenital defect established the *absence* of a causal connection between his disease and employment, effectively rebutting the presumption. *Id.* In dicta, the court stated "heart disease" in the statute was not limited only to heart attacks because the statute did not specifically exclude congenital or pre-existing heart disease from coverage. *Id.* at 51.

NRS 617.457(1) is similar to Fla. Stat. § 112.18(1), in that it broadly applies to "diseases of the heart". A case analogous to *Bailey* arising in Nevada would require PACT to compensate the employee, because, despite 5 years' employment and submission to annual physicals, the disease is not correctable by the employee.[16] [17]

1. Administrative convenience will not save a presumption that is constitutionally infirm.

The 1989 amendment to NRS 617.457(1) adding the conclusive presumption was intended to avoid a battle of the experts associated with proving causation in heart disease cases. *Gallagher v. City of Las Vegas*, 114 Nev. 595,

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[16] It is not axiomatic the worker's compensation statute is intended to only cover diseases arising from employment. The Nevada Supreme Court has repeatedly refused to imply provisions into the workers' compensation scheme that have not been expressly included by the legislature. *Silvera v. Employers Ins. Co.*, 118 Nev. 105, 109, 40 P.3d 429, 432 (2002).

[17] Respondents argue without authority that PACT's knowledge of the statute prior to entering into the agreement translates into a waiver of its right to due process. *See* Perry Opp. at 3; ECIN Opp. at 9. This Court has repeatedly stated it will not consider hypothetical questions. *See Princeton Univ. v. Schmid*, 455 U.S. 100 (1982). Thus, PACT was required to be subjected to the statute to acquire standing to challenge it.

600, 959 P.2d 519, 522 (1998). In *Cleveland v. Board of Ed. v. LaFleur*, 414 U.S. 632, 94 S. Ct. 791, 39 L. Ed. 2d 52 (1974), however, this Court stated that an irrebuttable presumption that assumes physical incompetency in the face of potentially contrary medical evidence is unconstitutional. 414 U.S. at 644. This was so, despite the "plethora of conflicting medical testimony" in *LaFleur* and other similar cases. *Id.* Instead of boosting an employee's case with a rebuttable presumption, the Nevada Legislature impermissibly transformed an evidentiary burden into a substantive rule of law. The State's desire for administrative ease has nullified the element of causation; precluding PACT from presenting a defense to the presumed fact that all heart disease arises from employment. *See Stanley v. Illinois*, 405 U.S. 645, 648, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972) (It is insufficient under the Due Process Clause to presume rather than to prove solely because it is more convenient).

Administrative ease and certainty alone cannot save a conclusive presumption from invalidity under the Due Process Clause; therefore, other reasonable and practicable means should be employed to establish the pertinent facts. *Vlandis*, 412 U.S. at 452. Nevada can provide the same benefit outside the workers' compensation scheme, as recognized in Connecticut.[18] Respondents claim this approach is a "distinction without a difference." However, the constitutionality of this method was upheld after its implementation,[19] and it continues to receive favorable treatment from that state's high court.[20]

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[18] *See Ducharme v. City of Putnam*, 285 A.2d 318 (Conn. 1971), striking down a similar conclusive presumption; *and see* the resulting statute Conn. Gen. Stat. § 7-433(c), enacted after *Ducharme*.

[19] *See Grover v. Town of Manchester*, 357 A.2d 922 (Conn. 1974).

[20] *See Bergeson v. City of New London*, 850 A.2d 184 (Conn. 2004) (the legislature's action in providing "special compensation, or even an outright bonus, to qualifying [police officers] and firefighters, serves a proper public purpose . . . The outright bonus provided by the statute is that the claimant is not required to prove that the heart disease is

(Continued on following page)

Alternatively, if the Nevada Legislature's intent was not to eliminate proving causation, NRS 617.457(1) should be changed to reflect the pre-1989 amendment, when the burden was only shifted, not eliminated.

EICN states the decision in *Howard v. City of Las Vegas*, 121 Nev. Adv. Op. 70, 120 P.3d 410 (Nev. 2005) will reduce an employer's fiscal responsibility in these claims because it eliminated the election of a retired employee to receive disability benefits pursuant to NRS 617.457(7). EICN Opp. at 9. Although true with regard to lost wages, an employee still receives medical benefits. *Id.* at 411. Thus, the fiscal impact, and hence the unfunded liability after *Howard* remains uncertain regarding worker's compensation benefits.

CONCLUSION

PACT respectfully requests that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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causally connected to (his) employment." 850 A.2d at 193-94 (brackets original) (citations omitted)).

APPENDICES

APPENDIX F

PUBLIC AGENCY COMPENSATION TRUST

INTERLOCAL COOPERATION AGREEMENT

THIS AGREEMENT, is made by and between the political subdivisions existing under the Constitution and laws of the State of Nevada and which are signatory to this agreement.

WHEREAS, Nevada Revised Statutes 277.080 to 277.180 permits political subdivisions to make the most efficient use of their powers by enabling them to cooperate with other political subdivisions on a basis of mutual advantage and thereby provide services which will be [sic] meet the needs of their citizens; and

WHEREAS, Nevada Revised Statutes 277.055 permits two or more political subdivisions of the State of Nevada to enter into a cooperative agreement for the purchase of insurance or the establishment of a self-insurance reserve or fund for coverage under a plan of workers' compensation as defined in NRS 616 and 617 and employer's liability; or insurance for any combination of these kinds of insurance; and

WHEREAS, the political subdivisions executing this agreement desire to join together for the purpose of providing workers' compensation coverage and jointly funding programs of pooled self-insurance, insurance and excess insurance for workers' compensation pursuant to NRS 616B.350 and related provisions;

NOW THEREFORE, in consideration of the mutual promises and agreements contained herein and subject to the provisions of Nevada Revised Statutes and all other

applicable rules and regulations, the parties hereto agree as follows:

ARTICLE I

DEFINITIONS

Section 1. *"Agreement"* shall mean this agreement entitled "Public Agency Compensation Trust" and as amended in the future.

Section 2. *"Board of Directors"* or *"Board"* shall mean the governing body of the PACT.

Section 3. *"Claim"* shall mean a claim made against a Member arising out of a Loss which is covered by insurance or pooling program of the PACT.

Section 4. *"Excess Insurance Program"* shall mean a program of the PACT under which Members or Participating Members are protected against designated Losses in excess of their Self-Insured Retention levels.

Section 5. *"Executive Committee"* shall mean the Executive Committee of the Board of Directors as described in Article 12 of this Agreement.

Section 6. *"Fiscal Year"* shall mean that period of twelve months as established by the Board of Directors as the fiscal year of the PACT.

Section 7. *"Loss"* shall mean a liability or potential liability of a Member including litigation expenses, attorneys' fees and costs covered by an insurance or pooling program of the PACT.

Section 8. *"Maintenance Deductible"* shall mean, as to any one Loss, that portion payable by the Member directly and not the PACT or its excess insurers.

Section 9. *"Member"* shall mean any Public Agency which is a member of the PACT, and shall include school districts, rural hospitals as defined in NRS 449.0177, whether a non-profit or public hospital, and such districts to which the Board has granted voting status. Other district or agencies whether or not the governing body of the City or County is *ex officio* the governing body as described in and subject to Article 3 of this Agreement may be a party to this Agreement but shall not be considered a Member for the purpose of voting or participation as a voting member of the Board or of any Executive or other committee in which voting Member status is required except when granted voting status pursuant to the following criteria. Voting status as a Member will exist for any Public Agency which meets three of the following four criteria:

1. Pays premiums and administrative costs of at least $10,000 annually
2. Contributes to the Loss Fund at least $10,000 annually
3. Maintains a payroll of least $500,000 annually
4. Has property values of at least $1,000,000 annually,

Such criteria may be changed from time to time by vote of the Board of Directors which change shall take effect subsequent to the meeting at which the Board approved the changes.

Section 10. *"PACT"* shall mean the Public Agency Compensation Trust created by this agreement.

* * *

ARTICLE 4

NAME OF PACT

The name of the PACT established by the Members hereunder shall be "PUBLIC AGENCY COMPENSATION TRUST."

ARTICLE 5

POWERS OF THE PACT

The PACT shall have all of the powers common to any Public Agency and all additional powers set forth in the interlocal cooperation laws of the State of Nevada, and the PACT is authorized to do all acts necessary for the exercise of said powers, including but not limited to, the following:

A. To make and enter into contracts;

B. To incur debts, liabilities, and obligations;

C. To acquire, hold, or dispose of property, contributions and donations of property, funds, services, and other forms of assistance from persons, firms, corporations, and governmental entities;

D. To sue and be sued in its own name, but not by its Members;

E. To settle any claim against the PACT or its Members as hereinafter provided;

F. To receive and use contributions and advances from Members, including contributions or advances of personnel, equipment, or property;

G. To invest any money in its treasury that is not required for its immediate necessities, pursuant to Nevada Laws applicable to investments by a Public Agency; and

H. To carry out all provisions of this Agreement.

* * *